

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Criminal Action
)	No. 13-10200-GAO
)	
DZHOKHAR A. TSARNAEV, also)	
known as Jahar Tsarni,)	
)	
Defendant.)	
)	

BEFORE THE HONORABLE GEORGE A. O'TOOLE, JR.
UNITED STATES DISTRICT JUDGE

SEALED LOBBY CONFERENCE

John J. Moakley United States Courthouse
Courtroom No. 9
One Courthouse Way
Boston, Massachusetts 02210
Tuesday, April 28, 2015
2:15 p.m.

Marcia G. Patrisso, RMR, CRR
Official Court Reporter
John J. Moakley U.S. Courthouse
One Courthouse Way, Room 3510
Boston, Massachusetts 02210
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Mechanical Steno - Computer-Aided Transcript

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P R O C E E D I N G S

THE COURT: So principally, I just wanted to deal with the fact about the 302.

MR. WEINREB: Okay. Although there are still a few remaining disputes on the Dolakov 302 as well.

THE COURT: Oh, okay. I thought -- okay. So the first page is not a problem. I think you're on the same page.

MR. WEINREB: Okay.

THE COURT: And so two questions occurred to me. I guess this is -- there are two reasons for sculpting, if we can call it that, the contents of this: One is to limit it to what each side would proffer. That's kind of an affirmative way of thinking about it; and then the other is to remove things that either side thinks should be removed. In other words, you might not offer a paragraph but not object to the government's offering it.

MS. CONRAD: Uh-huh.

THE COURT: But you might say, "No, that shouldn't go in no matter who offers it."

MS. CONRAD: Right.

THE COURT: Okay? So I'm trying to distinguish between those because some of the things where there were differences I thought might be in the category of you just weren't interested in it, not that you didn't think it should be there, and so we could go through it and I think maybe --

1 MS. CONRAD: Well, I think really all of these are
2 things where the government doesn't think we should be putting
3 them in. I don't think they're anywhere --

4 THE COURT: Well, they think it because of the kind of
5 evidence they are. I don't know if there's -- yeah, there's
6 probably a relevance objection as well.

7 MR. WEINREB: In some cases, although I think in most
8 cases where there was a relevance objection we agreed to take
9 it out. Maybe not. But for the most part. They're situations
10 where the government believes that it's -- particularly given
11 the fact that the person can't be cross-examined.

12 THE COURT: Right. And I have that in mind because
13 this is unusual in that we're, you know, dealing with evidence
14 that in the normal course of a regular guilt-phase trial,
15 non-death case trial, would not be admissible. But because of
16 the broader latitude for evidence in this phase, it is. But
17 that doesn't mean everything comes in either, of course. So we
18 have to deal with those.

19 So let's just get down to the nuts and bolts. On page
20 2, it says at the end of the paragraph in the middle of the
21 page, the government -- at the top of the page I think you're
22 in agreement. The government would strike the last sentence of
23 the fourth full paragraph.

24 MS. CONRAD: The one that says "Dolakov heard Tamerlan
25 Tsarnaev's parents" --

1 THE COURT: Yeah.

2 I mean, I'm inclined to strike it just to put a little
3 bit of a stake in the ground against double hearsay. Everybody
4 knows they went there. You said it a million times. I don't
5 think it's a fact that's in controversy but --

6 MS. CONRAD: Okay. I mean, not okay, but I
7 understand.

8 THE COURT: So I would take that sentence out, okay?

9 In the defense version in the next paragraph you would
10 omit the sentences about the friends. Again, I didn't know
11 whether you just weren't interested in putting that in or
12 whether you object to that being put before the jury.

13 MS. CONRAD: I didn't think it was relevant from --

14 THE COURT: We heard a little bit about it this
15 morning from Mr. Franca.

16 MS. CONRAD: I don't have the unredacted version so I
17 don't remember what it says.

18 THE COURT: "Vakhabov and Tamerlan's group of mutual
19 friends included Abu Bakar, Ibrahim LNU and Slava Go Lkov. Abu
20 Bakar is Chechen and currently resides in Texas."

21 MR. WEINREB: So, your Honor, there are no redactions
22 that the defense has made that we object to; in other words,
23 the mere fact that it's not --

24 THE COURT: Okay. So you don't care?

25 MS. CONRAD: I was just trying to focus on --

1 MR. WEINREB: We don't care.

2 THE COURT: So that can stay out, then?

3 MR. WEINREB: That can stay out.

4 THE COURT: All right. So that's one of the things I
5 wasn't clear about.

6 MS. CONRAD: I think the next one is the last sentence
7 on that next paragraph.

8 THE COURT: The last sentence on the next paragraph
9 and the next single-sentence paragraph.

10 MR. WEINREB: Yes.

11 THE COURT: And I would exclude both of those on this
12 principle: I think that the admission of these kinds of
13 documents, the 302s, can be appropriate when the evidence to be
14 presented is essentially factual -- historical factual in
15 nature, but not opinion, because I think opinion testimony is
16 testimony that especially calls for cross-examination to get
17 the metrics of the opinion, the intensity of it and various
18 things, and I think just a flat statement of opinion that is
19 uncross-examinable --

20 MS. CONRAD: Not subject to cross-examination.

21 THE COURT: Right.

22 -- should be -- let's see how she writes that.

23 So I think that's a reason for excluding it.

24 MS. CONRAD: May I just be heard as to these
25 particular ones? I get the general principle, your Honor, and

1 I know there's another one coming up --

2 THE COURT: There is.

3 MS. CONRAD: -- where he says I don't think Jahar
4 would have done that but for. That's an opinion. But to say
5 their relationship grew apart as Tamerlan's views became more
6 radical is a statement of fact. It's not an opinion that their
7 relationship grew apart. He's explaining his own conduct and
8 what he did as a result of his observations. And I think part
9 of --

10 THE COURT: I'll give you half of that sentence. The
11 word I have a problem with is "radical." I don't know what
12 this witness regards as radical or not.

13 MS. CONRAD: Well, I think he talks elsewhere about
14 jihadi videos and --

15 THE COURT: I think it's too vague a term. So if you
16 want the first half of the sentence, that their relationship
17 grew apart, that's fine. I don't have any problem with that.

18 MR. WEINREB: Nor do we.

19 MS. CONRAD: Well, I think it doesn't make sense
20 without the other part. I think it explains what he's saying.
21 I mean, these are both observations. "He was becoming an
22 extremist radical Muslim."

23 THE COURT: Okay. That's my offer.

24 MR. BRUCK: What if we took out "radical." "As his
25 views became more..."

1 THE COURT: Blank?

2 MR. BRUCK: "More pronounced."

3 THE COURT: No, no, we can't edit the document.

4 MS. CLARKE: We can't make it "As a result of Tamerlan
5 Tsarnaev's views"? I mean, that's what it means.

6 THE COURT: No, I don't think we can edit by changing
7 wording.

8 MS. CONRAD: Note my objection.

9 THE COURT: So take the whole thing out or do you want
10 half the sentence?

11 MS. CONRAD: No, I don't want half the sentence. It
12 doesn't make sense otherwise.

13 THE COURT: Okay. So those will be out.

14 Similarly, at the end of the next full paragraph on
15 the -- full paragraph on the next page, "all of them were
16 radical" for the same reason. And then you accept these that
17 are in the defense even though you didn't have it in yours?

18 MR. WEINREB: Yes. Yes.

19 MS. CONRAD: And then -- right. I think the next one
20 is page 4.

21 THE COURT: Page 4, the third from the bottom is the
22 way it works out. That's all you have on the page.

23 MS. CONRAD: Yup. Yup.

24 THE COURT: And you're exact opposites on this
25 paragraph.

1 MS. CONRAD: Oh, like I said, I don't have the rest of
2 it, but I understand him, that "Tsarnaev's influence could be
3 the only thing that pushed Jahar," that's an opinion and I
4 accept that, but "Jahar is like a little boy," I mean, those
5 are his observations.

6 MR. WEINREB: Your Honor, I think under the
7 circumstances that's not an observation; that's an opinion.

8 MS. CONRAD: Well --

9 MR. WEINREB: I can imagine 20 questions I would want
10 to ask him about that, what exactly he actually meant by that.

11 MS. CONRAD: Well, it's sort of like if he said
12 somebody was shot, you know? Is that an opinion or is that an
13 observation? I mean, you watch someone's behavior and --

14 THE COURT: I think if we were applying the rules of
15 evidence it would be a lay opinion.

16 MS. CONRAD: That someone was shot?

17 THE COURT: Yeah. Someone's drunk. That's a classic
18 lay opinion. So I think the paragraph should go out. Since
19 you don't want the middle sentence, which is fine, and the
20 government doesn't agree with it, so I think that paragraph
21 should go out. And I think that does it.

22 So somebody will make a copy that conforms to this for
23 the witness?

24 MS. CONRAD: And can I just -- with respect to what
25 the Court said at sidebar.

1 MR. WEINREB: Yeah, we have some disputes on the
2 Dolakov 302s.

3 THE COURT: All right. Let's do that.

4 MR. WEINREB: So it might be useful for the record if
5 these have exhibit numbers, which I believe they do.

6 MS. CONRAD: Yeah, it's 3270A.

7 MR. WEINREB: Which is which date?

8 MS. CONRAD: Which is the April 30th. Date of entry
9 is made first. It's an eight-page document.

10 MR. WEINREB: Can I have the exhibit number again?

11 MS. CONRAD: I'm sorry?

12 MR. WEINREB: The exhibit number again?

13 MS. CONRAD: 3270A.

14 MR. WEINREB: 3207A?

15 MS. CONRAD: No, 3270A.

16 MR. WEINREB: 3270A? All right.

17 So this document that I have, this copy, is the --
18 what the defense proposes to offer with various parts
19 highlighted which are parts that the government believes should
20 be excluded. On the first page it's the last full paragraph
21 which we object to on relevance grounds, and following on to
22 the following paragraph, and then the next one, the
23 one-sentence paragraph.

24 And essentially the government's objection is that
25 Dolakov's own experience with the FSB and Moscow has nothing to

1 do with this case but -- I mean, I don't think there's any
2 evidence that either Tsarnaev brothers were in Moscow and --

3 THE COURT: Okay. I'm inclined to leave it in.
4 General, general relations between Russia and Chechnya and the
5 people, I think, is part of the theme here. So it's not, you
6 know, powerful evidence, I don't think, but I think it's
7 consistent with one of the themes.

8 MR. WEINREB: Then on page 3 of 8, the third full
9 paragraph, the third sentence, "Tamerlan told Dolakov that the
10 FBI had come and spoken with him."

11 That we object to on the grounds that it is more
12 prejudicial than probative. It's really -- given that there's
13 no context for it in this document whatsoever, it's not really
14 probative of anything, and it's prejudicial in the sense that
15 it could easily -- there's a risk that it will mislead the jury
16 and confuse the issues.

17 THE COURT: Will the 2011 FBI 302s of Tamerlan and his
18 parents be in before the jury?

19 MS. CONRAD: We're offering them and they're
20 objecting.

21 MR. WEINREB: We have moved to exclude them.

22 THE COURT: Maybe that's a prior decision.

23 MR. WEINREB: So that's part of our larger motion in
24 limine.

25 THE COURT: Because that would connect to this, right?

1 MR. WEINREB: That's true.

2 THE COURT: So maybe we should talk about that.

3 MR. WEINREB: Very well.

4 MS. CLARKE: Bill, that's 3236A, the FBI reports.

5 MS. CONRAD: 3236A and B, or just A?

6 MS. CLARKE: No, there's two of them. It must be A
7 and B. I just had an A down here.

8 MS. CONRAD: There's all sorts of references to it in
9 the Homeland Security and Intelligence Community reports.

10 THE COURT: And these are just the -- yeah, here they
11 are.

12 MR. WEINREB: So, your Honor, for the record now, I
13 believe we were talking about --

14 THE COURT: This is 3235A and 3236A.

15 MR. WEINREB: That's all I was going to say at that
16 point.

17 So the government's objection, unless you want to read
18 them first.

19 THE COURT: Well, I read them yesterday.

20 MR. WEINREB: Okay. So the entire --

21 MR. BRUCK: I think we should clarify we're not going
22 to offer the actual 302s.

23 MS. CONRAD: We want to --

24 MR. BRUCK: We want to simply show the fact of the
25 interview.

1 MS. CLARKE: And the connection.

2 MS. CONRAD: So there are references to the interviews
3 in a number of other exhibits including the Homeland Security
4 committee report and the Intelligence Community report. And
5 really what we want to get in is the fact that, first of all --
6 and this is also disputed evidence -- the fact that there was
7 information received from the Russian government regarding
8 Tamerlan and Zubeidat's radicalization, and second of all, that
9 this prompted the FBI to open an investigation into them which
10 they went and interviewed them.

11 We're not really interested in the contents of the
12 302s as far as what Zubeidat said and what Tamerlan said and
13 what Anzor said, what we want is the fact that this information
14 was there because it corroborates the evidence that Tamerlan
15 was becoming radicalized and that Zubeidat was part of that
16 process. And those are two important parts of our narrative.

17 Now, you know, I think the government's objection is
18 they don't want there to be speculation about, you know, could
19 the FBI have prevented this and why did the FBI do this and why
20 did the FBI do that, and I've been very careful in redacting
21 the Homeland Security and Intelligence Community reports to
22 take out the discussion of, you know, possible
23 miscommunications, failures of follow-up or whatever you will.

24 We're not trying to say, you know, Gee, what if the
25 government had done this? What if the FBI had done that? But

1 we think the fact that there was information received and the
2 contents of that information, which is the SMS text that we
3 want to offer, is relevant because it shows what was happening.
4 I mean, so much of the testimony now that people are offering
5 saying, Yes, I offered a change -- I noticed a change in time
6 in Tamerlan and Zubeidat, you know, the government could argue
7 at the end of the day, Well, gee, that's what people say now
8 but it's colored by hindsight when, in fact, what we have is
9 contemporaneous reports of the process in real time. And that
10 is powerful corroboration.

11 Sorry. I didn't mean to take that away from you,
12 David.

13 MR. BRUCK: No. And this goes back to the January
14 text from Zubeidat to her former son-in-law in which she
15 makes -- you cannot read this without seeing her as having
16 radicalized, as having a sort of jihadist mindset on her own,
17 of being sympathetic with -- fearful and yet sympathetic with
18 what she said Tamerlan is doing. This is at a time when the
19 defendant was 17 years old and still in high school. So it is
20 tremendously powerful evidence.

21 The government says, Well, we don't know what that is.
22 We just got that from the Russian government and it could be
23 completely bogus. It is characteristic of her. It even has
24 her odd, quirky punctuation in it. But these things are all of
25 the peeps. They get this -- the Russian government,

1 apparently -- it's not -- we can't prove it beyond a reasonable
2 doubt, but it is certainly more likely than not that this is an
3 authentic text, was probably handed over by a nervous family
4 member for all we know, to the Russian government, and then the
5 U.S. government was not given the text originally but they were
6 notified -- as we understand all the investigative reports that
7 have followed since, they were notified to check these people
8 out. They did. And the fact that they did corroborates the
9 fact that there was some level of credibility or -- to this
10 initial text.

11 So all of these things link together, and if you cut
12 them all out it leaves us with the -- it creates the false
13 impression that, as Ms. Conrad said, that it's all just
14 hindsight, and at the time nobody actually saw
15 anything -- there was no evidence of anything. It's not true
16 and this shows it.

17 And, you know, of course there's a danger in any piece
18 of evidence maybe the jury will take it wrong, but this goes to
19 the core of our story and it just seems so -- and given the
20 defendant's age at the time and the power of the mother and the
21 older brother and all of that put together, the mere fact that
22 the FBI followed up, got this tip, later on we get the actual
23 text that started the process in motion. The government can
24 say, Well, we don't really know what that is. It's not
25 corroborated. That's grist for the mill, but that's not

1 relevance; that's the weight.

2 MS. CONRAD: May I just add one thing to that? If
3 there really is an issue about the circumstances under which
4 this text was required and so forth, all we have is the
5 government's representation that this was acquired afterwards.
6 It seems to me that the Court should have a hearing, and
7 outside of the hearing of the jury, to determine any
8 preliminary issues of reliability and the circumstances. But
9 we have no independent knowledge of that.

10 MR. WEINREB: Your Honor, the government objects to
11 any evidence of the Russian communication in 2011 notifying
12 the -- or asking -- really requesting that the American
13 government investigate Tamerlan Tsarnaev for two reasons:
14 First, it's unreliable. The government also received an
15 official communication from the Russian government no different
16 from this one that several members of the defense team had
17 traveled to Russia, had misrepresented their purpose for being
18 there, had informed people who they were interviewing that they
19 were FBI agents, and based on all of that, they were expelled
20 from Russia.

21 There was no difference in the quantum of reliability
22 between this one thing that was received in 2011 and what the
23 defense adamantly claims is utterly inaccurate, unreliable and
24 untrustworthy evidence. There's simply no foundation for this,
25 where this came from.

1 As the defense attorneys have themselves repeatedly
2 claimed in connection with this case, and both intrajudicially
3 and extrajudicially, the Russians are suspicious of the
4 Chechens. They view all Chechens as terrorists and so on.
5 There is -- are indicia of unreliability attached to this and
6 no way to test its reliability.

7 But even more important, this communication --
8 basically what would come into evidence is there was a content
9 list communication from the Russian government saying, We
10 suspect that these people are radicals and might be terrorists.
11 Please go investigate them. It is left to the jury entirely to
12 speculate what well of evidence might have prompted the Russian
13 government to send such an official communication to the United
14 States government.

15 The jury knows absolutely nothing about how
16 intelligence agencies function, about what threshold of
17 suspicion must be crossed or communication like that to come
18 our way, whether it represents knowledge on somebody's part,
19 whether it's, you know, pure speculation on their part. It is
20 really a quintessential example of the kind of evidence that
21 has the potential to confuse and mislead the jury and waste a
22 lot of their time in trying to figure out what could possibly
23 have prompted this.

24 Its probative value, on the other hand, is low
25 primarily because it's cumulative of a great deal of other

1 evidence that the defense is going to put in that Tamerlan
2 Tsarnaev radicalized at a certain time and in a certain way.
3 These Dolakov 302s, the Vakhobov 302s, they are at least more
4 reliable in the sense that there are actual identified people
5 and we have their actual words here as opposed to just guessing
6 at what the information was.

7 It is indeed the case that after the marathon bombing,
8 in response to a follow-up request from the American
9 government, the Russian government provided these two things:
10 What purports to be an email between Zubeidat Tsarnaev and one
11 of her son-in-laws -- her former son-in-laws -- and what
12 purports to be this conversation between Mr. Kartashov and
13 Zubeidat Tsarnaev. But again, we have absolutely no idea what
14 the provenance of these are, whether they're accurate, whether
15 they're reliable, whether they were invented in order to
16 justify the warning that had previously been given, whether
17 they're all the evidence, whether they're a fraction of the
18 evidence, whether they're really evidence at all.

19 It's not the kind of information on which a jury that
20 is being asked to decide whether Dzhokhar Tsarnaev is
21 sufficiently more culpable than other murderers and should be
22 put to death, this kind of thing which is so remote from the
23 considerations that really need to weigh significantly in their
24 minds should not be brought in. It's simply too much -- it's
25 too much off to the side, it's too unreliable, it's too

1 distracting for the jury, it opens up too many cans of worms
2 and it's unnecessary.

3 MR. BRUCK: One thing that has to be corrected is that
4 there may be a fair amount of evidence that Tamerlan Tsarnaev
5 radicalized, but there is very little hard evidence that we can
6 point to, or documentary evidence, that the mother radicalized.
7 And that is a very important part of the story. This text from
8 her really is extremely revealing and it's not cumulative to
9 anything else. So if we don't have that, we're really -- we're
10 really in a hole.

11 The government is free to point out that its
12 provenance is uncertain. It has indicia of being -- it is
13 stylistically this sort of over-the-top crazy style that she
14 writes here. The content is unusual because she's much more
15 revealing than in most of her emails -- than any of her other
16 emails or texts.

17 This business about it's just like the report
18 of -- the text from her is the most critical thing --

19 THE COURT: I understand all of that. I want to come
20 back now to the Dolakov documents. So this all emanates from
21 that single sentence?

22 MR. BRUCK: Yes, it does.

23 THE COURT: Okay. Is there anything else on
24 that -- in the rest of this document?

25 MR. WEINREB: Yes.

1 THE COURT: I just want to identify what the scope of
2 the controversy is.

3 MR. WEINREB: So on page 4 of 8, the next page,
4 the -- it's a little hard for me to tell because of the
5 blackout.

6 MS. CONRAD: It's Dolakov thought that Tamerlan was
7 being followed by the FBI because of his views which
8 explains why --

9 MR. WEINREB: Yeah, if I could just identify where on
10 the document.

11 MS. CONRAD: Oh, sorry.

12 MR. WEINREB: There's a paragraph that begins, "In
13 January 2013." It's the last sentence of that paragraph.

14 (Pause.)

15 THE COURT: Okay. Anything else?

16 MR. WEINREB: Nothing else in that document. There is
17 another Dolakov document.

18 MR. BRUCK: I think we have one thing to add given the
19 ground rules that have been laid out about opinion, which is at
20 the bottom of page 5 Dolakov offers the opinion that he had
21 always thought it odd how close they were and says that in
22 their culture older and younger brothers are not that close and
23 do not hang around together. You know, if we're going to be
24 cutting out opinion, let's cut that.

25 THE COURT: Yeah, I think so.

1 MR. WEINREB: Then I think we should also cut the next
2 one, the next full paragraph on 36.

3 THE COURT: Yeah, fine. Well --

4 MR. WEINREB: Leave "Tamerlan" --

5 THE COURT: -- at least the first sentence.

6 MS. CONRAD: We can take the whole paragraph out. It
7 doesn't really --

8 MR. WEINREB: Either one.

9 THE COURT: Right. Right.

10 MR. WEINREB: And then there's another Dolakov 302
11 which is dated May 21st, 2013, if you'd be so kind to give me
12 the exhibit number.

13 MS. CONRAD: Which one?

14 THE COURT: 3271A.

15 MR. WEINREB: 3271A.

16 MS. CONRAD: Yes.

17 MR. WEINREB: Okay. So the record is clear.

18 Again, this is being offered for entirely one
19 paragraph, and we object to one line in the paragraph which is
20 the second from the bottom, "Dolakov advised that Jahar did not
21 really speak when he was with his brother Tamerlan." And we
22 object to that because it's stated generally, as a general
23 proposition about the two of them when they're together, but
24 Dolakov had absolutely no foundation for making that. He had
25 only met Jahar once.

1 MS. CONRAD: But he says that.

2 MR. WEINREB: I admit he does say it, but I believe
3 the way the sentence is phrased, that is precisely the kind of
4 thing where the government would absolutely on
5 cross-examination make sure that the witness clarified that he
6 had no basis for saying something like that other than what
7 happened in the gym, and then we would try to establish just
8 what a short time they were together in the gym and whether
9 they were occupied doing other things and whether he was paying
10 attention to what Dzhokhar was doing all the time. It's just
11 not fair.

12 MS. CONRAD: They have all that in the document. The
13 document talks about what they did while they were at the gym.

14 MR. BRUCK: And they also have on video parts of it.

15 MS. CONRAD: Right. But he said --

16 THE COURT: All right. I think that one can stay in,
17 in the context where it says he only saw him that one time.

18 MR. BRUCK: You said it can stay in?

19 THE COURT: Can.

20 MS. CONRAD: Yes. I don't think you had any
21 objections on 3269, according to my notes, which is the June
22 11th.

23 MR. WEINREB: That's right. We had no objection to
24 that one.

25 THE COURT: Okay.

1 MR. WEINREB: Just -- I don't want to belabor the
2 earlier argument, I just want to add one thing to the record in
3 response to Mr. Bruck's statement about Zubeidat's
4 radicalization -- purported radicalization. She's an available
5 witness to the defense, as far as we know, and until -- unless
6 it's shown otherwise, I don't think that anything she had
7 written ought to be admitted into evidence.

8 MS. CONRAD: She has an outstanding warrant. It's not
9 clear she would be allowed into the country.

10 MR. WEINREB: She would be allowed into the country to
11 testify.

12 MR. BRUCK: I'm sure.

13 MR. WEINREB: She's a U.S. citizen. She doesn't need
14 permission to come into the country.

15 MS. CONRAD: I just do also want to add with respect
16 to this whole thing about the Russian information, I mean, you
17 know, looking at the Intelligence Community record and so
18 forth, Tamerlan was placed on the terrorist watch list.

19 THE COURT: Yeah, okay. I want to solve these
20 documents because we have a jury sitting there and they're
21 going to get read to for a while. I want to get to it, okay?

22 MS. CONRAD: Okay. Right. I get it.

23 THE COURT: And so we, I think, indicated at the
24 bottom of page 5 and the top of page 6 those two short
25 paragraphs will come out. I think just to move things along,

1 we should take out the sentence the government objects to about
2 the FBI. That doesn't defeat the rest of your argument. We'll
3 deal with that in other respects and move on so we could get
4 this read to the jury. It's the -- I guess it's the second
5 sentence of the third paragraph on page 3.

6 MS. CONRAD: Okay.

7 THE COURT: I'm sorry. The third sentence.

8 MS. CONRAD: Yeah, I got it.

9 THE COURT: That's just to move us off the dime here.

10 MS. CONRAD: And also on the following page, on page
11 4, Dolakov thought that Tamerlan was being followed by the FBI?

12 THE COURT: Let me look at that again. Yes, yes. The
13 last line, yes. I think then you can get the Dolakov stuff in.

14 MS. CONRAD: Judge, your Honor has said at sidebar
15 that you were going to tell the jury that, you know, because
16 that these are witnesses or these people are not subject to
17 cross-examination, they should give it less weight or whatever
18 you were going to say. I think if you're going to say anything
19 like that, it shouldn't come now; it should come in the final
20 instructions just as it would, for example, if someone were
21 testifying pursuant to a plea agreement or had gotten some kind
22 of consideration. That instruction is not generally given at
23 the time the person testifies; it is given at the end of the
24 case.

25 THE COURT: Sometimes it's given both. I'm going to

1 do it now.

2 MS. CONRAD: Well --

3 THE COURT: I'll do it again, actually.

4 MS. CONRAD: -- I emailed some cases on the Fifth
5 Amendment point. I mean, by analogy one of them was *Bartelho*
6 and the other one was *Gary*, both First Circuit. *United States*
7 *versus Gary* and *United States versus Bartelho*. The fact that a
8 witness takes the fifth as to a collateral matter does not make
9 their testimony inadmissible. I think it's by analogy here.

10 THE COURT: Yeah, I don't think the cases are on
11 point. This is a unique circumstance again, by nature of this
12 proceeding. It would be justifiable to refuse to accept the
13 document at all. I'm proposing to relax it so you could have
14 the benefit of the document, but attaching to that the
15 condition that the jury understand that the reason the witness
16 isn't saying this on the stand subject to cross-examination is
17 because he refuses to. I won't say it that bluntly. But I
18 think if they have otherwise inadmissible evidence, they should
19 understand a little bit about the context, that's all. I just
20 think it's a balancing ruling.

21 MS. CLARKE: And so the Court remembers that Dolakov
22 isn't refusing. We just can't find him.

23 THE COURT: Right. No, this is Vakhabov. This is
24 Vakhabov.

25 MS. CONRAD: I might need a couple of minutes just to

1 make the additional redactions.

2 THE COURT: Okay.

3 MS. CONRAD: I know. I just don't want to
4 accidentally have it flash up on the screen and see something
5 we don't want to see.

6 (The proceedings adjourned at 2:47 p.m.)

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C E R T I F I C A T E

I, Marcia G. Patrisso, RMR, CRR, Official Reporter of the United States District Court, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the matter of Criminal Action No. 13-10200-GAO, United States of America v. Dzhokhar A. Tsarnaev.

/s/ Marcia G. Patrisso
MARCIA G. PATRISSE, RMR, CRR
Official Court Reporter

Date: 1/22/16